92-2060

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMIE MARIE (BUNGER) PRAYSON,
and JASON DEAN (BUNGER) PRAYSON,

Petitioners,

vs.

KANSAS CITY POWER & LIGHT COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI (Volume 1 of 2)

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MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Jamie Marie (Bunger) Prayson and Jason Dean Prayson	)	
Appellants,	)	
vs.	)	No. WD44932
Kansas City Power & Light Company,	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY

The Honorable K. Preston Dean, Judge

Before Ulrich, P.J.; Shangler and Fenner, JJ.

Jamie Marie Prayson and Jason Dean Prayson, siblings, appeal from the judgment n.o.v. in favor of defendant Kansas City Power & Light Company (KCP&L), following trial in which the jury's verdict awarded appellants $1,300,000 for the wrongful death of their father, Larry Dean Bunger. The Praysons contended that the trial court erred (1) in applying *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. banc 1991), retroactively, and (2) in finding that Count I of their second amended petition failed to state a cause of ac-

tion and denying their motion for leave to file the petition. The Missouri Supreme Court in *Zueck* directed that the inherently dangerous exception to the rule that a landowner is not liable to the injured employee of an independent contractor no longer applies where the employee is covered by workers' compensation insurance. *Id.* at 390.

The trial court's judgment n.o.v., applying *Zueck* retroactively, is affirmed.

Jason and Jamie (Bunger) Prayson are the natural children of Larry Dean Bunger. Mr. Bunger was an employee of B & L Electric, Inc. (B & L), an independent contractor hired by KCP&L to install lightning arrestors and to squirrel-proof certain transformers on KCP&L utility poles in the Kansas City area. Mr. Bunger was performing this work on January 18, 1985, when the non-insulated wrench he was holding in his right hand slipped off the de-energized bottom portion of a fuse mounting and came into contact with the top of the fuse mounting, which was still energized with electricity. Mr. Bunger was electrocuted.

Following Mr. Bunger's death the Praysons filed a claim for workers' compensation death benefits against B & L. The Praysons and B & L entered into a compromise structured

settlement of that claim which was approved by the Division of Workers' Compensation.

On January 15, 1988, the Praysons filed suit against KCP&L in a single-count petition alleging that KCP&L's negligence was the direct cause of Mr. Bunger's death. On January 23, 1991, the Prays sought leave of the trial court to file a Second Amended Petition, splitting their cause of action against KCP&L into Count I, alleging KCP&L was negligent and directly liable for Mr. Bunger's wrongful death, and Count II, alleging KCP&L was vicariously liable under the "inherently dangerous activity" doctrine. The trial court denied leave to amend on the ground that Count I failed to state a cause of action. The Praysons filed their Third Amended Petition on February 4, 1991, stating only a claim for vicarious liability, and proceeded to trial. On February 13, 1991, the jury rendered its verdict in favor of the Praysons in the amount of $2,000,000,. By finding Mr. Bunger to have been 35% at fault, the jury reduced the award to $1,300,000.

KCP&L filed a Motion for Judgment n.o.v., or in the alternative, for a new trial, on February 26, 1991. While these motions were pending, the Missouri Supreme Court handed down its decision in *Zueck* (decided May 3, 1991). The trial court held that the *Zueck* decision applied retroactively, and

therefore granted KCP&L's motion for judgment n.o.v. on May 24, 1991.

I.

The issue presented in point I is whether *Zueck* applies retroactively. If the accident which caused Mr. Bunger's death occurred today, under *Zueck*, KCP&L would not be vicariously liable for Mr. Bunger's death. However, Mr. Bunger's death occurred before the supreme court decided *Zueck*. *Zueck* instructs that a landowner who employs an independent contractor is not vicariously liable for the injuries sustained by an employee of the independent contract whose injuries are caused by an inherently dangerous condition if the employee is covered by Workers' Compensation Insurance. *Zueck*, 809 S.W.2d 390. The Praysons argue that *Zueck* is prospective because its teaching is procedural rather than substantive. They assert in the alternative that if *Zueck* is a substantive decision, it meets the three-prong test of *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. banc 1985), for prospective-only application.

Both the Eastern District and this Court have already determined the issue of whether *Zueck* applies retroactively. In *Aubuchon v. Hyland*, 820 S.W.2d 613 (Mo. App. 1991), the Eastern District applied the *Sumners* analysis to *Zueck* and found that "*Zueck* must be applied retroactively." *Id.* at 617.

This Court, concurring in the rationale expressed in *Aubuchon*, recently applied *Zueck* retroactively, also. *Goodrum v. Kansas City Power & Light Co.*, No. WD46115 (Mo. App. Oct. 20, 1992).

Further historical review and analysis of the courts' treatment of whether a landowner is vicariously liable to the injured employee of an independent contractor who is injured because of the inherently dangerous activity of the contractor may be helpful. At common law, one who contracts with an independent contractor is not liable for bodily harm caused by the torts of the contractor or the contractor's servants. *Zueck*, 809 S.W.2d at 384. An exception to the general rule exists where the activity undertaken by the independent contractor is inherently dangerous. *Id.* The common law subjects the landowner to liability for injuries resulting to innocent third parties caused by the independent contractor's failure to take special or reasonable precautions against inherent risks or dangers. *Id.*

Whether employees of independent contractors are included among "innocent third parties" to which landowners are vicariously liable has been answered both ways by the Missouri Supreme Court in the past. In *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16 (1912), the supreme court held that the inherently dangerous activity exception was not applicable

to servants of an independent contractor. *Id.* 145 S.W. at 24. Sixteen years later, the supreme court overruled *Salmon* and extended the inherently dangerous exception in *Mallory v., Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617 (Mo. banc 1928), to employees of independent contractors, making the landowner vicariously liable for the employee's injuries. *Id.* 6 S.W.2d at 624-27. The supreme court abandoned *Mallory* in *Smith v. Inter-County Telephone Co.*, 559 S.W.2d 518 (Mo. banc 1977), where the court allowed the employee of an independent contractor a cause of action against a landowner only if the employee could show the landowner negligent failed to ensure that adequate precautions were taken to avoid injury from the inherently dangerous activity and that such negligence caused the employee's injury. *Id.* at 523. The supreme court returned to the *Mallory* standard in *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. banc 1990), eliminating *Smith's* requirement of owner negligence. *Id.* at 511. The supreme court's last pronouncement on the issue came sixty-three years after *Mallory* in *Zueck*, where the court held that in light of the advent of workers' compensation laws, the inherently dangerous exception no longer applies to employees of independent contractors covered by workers' compensation. *Zueck*, 809 S.W.2d at 388-90. The

supreme court overruled *Mallory* and all cases following *Mallory*. *Id.* at 390.

In *Sumners v. Sumners*, 701 S.W.2d at 723, the Missouri Supreme Court recognized the general rule that a change in the law by judicial decision is to be given retroactive effect. While acknowledging the general rule, the court also acknowledged it had the authority "to declare whether such decisions are retroactive or prospective 'based on the merits of each individual case,'" *Id.* at 723 (quoting *Keltner v. Keltner*, 589 S.W.2d 235, 2239 (Mo. banc 1979)), and noted that its approach to the "retroactive/prospective" issue has provided two exceptions to the general rule of retroactivity. *Sumners*, 701 S.W.2d at 723.

The first exception "is found when the change pertains to *procedural* as opposed to *substantive* law." *Id.* (emphasis added). Such procedural decisions are to be given prospective effect only. *State v. Shafer*, 609 S.W.2d 153, 157 (Mo. banc 1980). The second exception turns not on whether the change in the law is procedural or substantive, but on the issue of fundamental fairness. *Sumners*, 701 S.W.2d at 723. The supreme court adopted a three-part test to resolve the issue of fairness in determining whether an overruling decision should be given prospective-only effect:

> First, the decision in question must establish a new principle of law...by overruling clear past precedent.... Second, the Court must determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation. Third, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule.

Id. at 724 (citations omitted).

Aubuchon and *Goodrum* concluded that *Zueck* announced a substantive, not procedural, change in the law. *Aubuchon*, 820 S.W.2d at 616-17; *Goodrum*, No. WD46115, slip op. at 3-4. "The distinction between substantive law and procedural law is that 'substantive law relates to rights and duties which give rise to a cause of action,' while procedural law 'is the machinery for carrying on the suit.'" *Shepherd v. Consumers Coop. Ass'n*, 384 S.W.2d 635, 640 (Mo. banc 1964) (quoting *Barker v. St. Louis County*, 340 Mo. 986, 104 S.W.2d 371, 378 (1937)). Before *Zueck*, one who contracted with an independent contractor could be held vicariously liable, under the inherently dangerous exception, for the injuries sustained by the employees of the independent contractor. *See Mallory*, 6 S.W.2d at 624-27. Thus, a cause of action existed against

the owner for injuries suffered by the independent contractor's employees caused by an inherently dangerous condition. After *Zueck*, the inherently dangerous exception no longer applies to employees of independent contractor covered by workers' compensation. *Zueck*, 809 S.W.2d at 390. The common law general rule that one who contracts with an independent contractor has no vicarious liability for the torts of an independent contractor remains in force for employees covered by workers' compensation.

While a cause of action once existed against a landowner on a theory of vicarious liability for the torts of an independent contractor resulting from an inherently dangerous condition, after *Zueck*, that cause of action can no longer be asserted. Since *Zueck* extinguishes the rights of employees of independent contractors to bring a particular cause of action, *Zueck* states a substantive change in the law, and does not fall within *Sumners'* first exception to retroactive application.

The *Aubuchon* court also applied the three-part fundamental fairness test, the second *Sumners* exception. Once again, the court correctly found that fundamental fairness leads to retroactive application of *Zueck*.

The first factor in the *Sumners* fairness test to determine whether an overruling decision of the court should be given

prospective-only effect is whether the decision "establish[es] a new principle of law...by overruling clear past precedent...." 701 S.W.2d at 724 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S. Ct. 349, 355, 30 L. Ed.2d 296, 306 (1971)). In *Chevron*, the United States Supreme Court includes another method in the first factor by which a new principle of law may be established, and the conditions necessary for that method, to qualify for prospective-only application: "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, *...or by deciding an issue of first impression whose resolution was not clearly foreshadowed.*" *Chevron*, 404 U.S. at 106, 92 S. Ct. at 355, 30 L. Ed.2d at 306 (emphasis added). *Zueck* does not require retroactive application under either of the methods in *Sumners'* first fairness factor.

The *Aubuchon* court found that *Zueck* did not establish a new principle of law by overruling clear past precedent because *Zueck* "reflects a return to the state of the law pre-*Mallory*." *Aubuchon*, 820 S.W.2d at 617. By eliminating the inherently dangerous activity exception for the employees of independent contractors, *Zueck* does result in a return to the general common law rule in effect before *Mallory*. However, even if *Zueck* results in a new principle of law (in light of the fact

that the impact of workers' compensation the question of whether the employees of independent contractors are included in the inherently dangerous activity exception has not been considered by the Missouri Supreme Court before *Zueck*), this new rule is not established by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Although *Zueck* overrules *Mallory* and all cases following *Mallory*, neither *Mallory* nor *Ballinger*, which followed *Mallory*, can be considered clear past precedent on the issue of whether the inherently dangerous activity exception should be applied to employees of independent contractors covered by workers' compensation, the issue considered in *Zueck*. *Mallory* involved an accident suffered by an employee prior to the effective date of Missouri's first workers' law, and did not consider the impact of the new law. *Zueck*, 809 S.W.2d at 387. *Mallory* could not establish clear precedent on the issue presented in *Zueck*. While *Ballinger* was decided after the effective date of workers' compensation laws, "the dispositive issue [in *Zueck*]...was not before the court in *Ballinger*." *Zueck*, 809 S.W.2d at 387.

While *Zueck* may establish a new principle of law by deciding an issue of first impression, the resolution of this issue was clearly foreshadowed. As the *Zueck* court notes,

> With the advent of Workers' Compensation laws, most states have restricted the application of the inherently dangerous doctrine to its original concept—protection of innocent third parties not involved in the activity. Thus, under the law of those jurisdictions, employees of independent contractors may not recover from the landowner by invoking the inherently dangerous exception.

Id. The first part of the *Sumners* fundamental fairness test does not call for prospective-only application of *Zueck*.

The second consideration under the *Sumners* fundamental fairness test requires the court to determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective application. *Sumners*, 701 S.W.2d at 724. The court in *Aubuchon* found that:

> The purpose of *Zueck* is to promote the workers' compensation system, which is a product of trade-off: the employer (here an independent contractor) forfeits his common law defenses to suits against him for his employee's injuries and assumes automatic liability; the employee forfeits his right to a potentially lucrative common law judgment in return for assured compensation. *See Zueck* at 388. Retrospective operation enhances the purpose and effect of *Zueck* by upholding the balance the legislature previously struck in enacting the workers' compensation law.

Aubuchon, 820 S.W.2d at 617.

The Praysons argue that consideration of the relationship between workers' compensation law and the impact of the inherently dangerous activity doctrine was "an element" of the supreme court's decision in *Zueck*, but argue that it was not the "primary purpose" of *Zueck*. Rather, they contend the intent of the supreme court in *Zueck* was to eliminate the untenable position in which "innocent, non-expert" landowners who sought expert assistance from independent contractors had been placed by the application of the exception to employees of the contractors.[1]

Without addressing the validity of the argument advanced by the Praysons as the primary purpose of *Zueck*, this Court notes that although elimination of the difficult position the exception placed non-expert owners in may have been a consideration which lead to the holding in *Zueck*, it was not the primary purpose of the rule announced in *Zueck*. The supreme court limited its holding in *Zueck* to those employees of inde-

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[1]*See Zueck*, 809 S.W.2d at 387-88, where the court notes that the application of the inherently dangerous activity exception for employees of independent contractors creates an anomaly in the law. The court remarks that by permitting employees of independent contractors to invoke the exception, the law actually (1) rewards owners who, despite their lack of expertise, choose to perform work negligently resulting in injury to workers, (2) increases the risks to innocent third parties, and (3) punishes owners who seek expert assistance in an effort to avoid liability for injury. *Id.*

pendent contractors *covered by workers' compensation. Zueck*, 809 S.W.2d at 390. If the primary purpose of *Zueck* had been that which the Praysons suggest, it is doubtful the supreme court would have limited its holding as it did. Rather, the supreme court would have held the exception inapplicable to employees of independent contractors retained by non-expert landowners, regardless whether such employees are covered by workers' compensation.

Aubuchon determined that retroactive application of *Zueck* enhances its purpose and effect "by upholding the balance the legislature previously struck in enacting the workers' compensation law." *Aubuchon*, 820 S.W.2d at 617. Retroactive application corrects the distortion of the workers' compensation law created by application of the exception to employees of independent contractors who are covered by workers' compensation laws, as the supreme court found in *Zueck*:

> The application of the inherently dangerous exception also distorts workers' compensation laws. The exception, if extended to employees of an independent contractor, permits a limited class of injured workers—those who can convince a judge that their work for an independent contractor was inherently dangerous—to avoid the limitations of workers' compensation. This is contrary to the fact that the economic system permits workers who presume to undertake dangerous work to bargain for an enhanced reward for assuming the danger

> and despite the intended exclusivity of workers' compensation as an injured workers' remedy.

Zueck, 809 S.W.2d at 390 (footnote omitted). Permitting the Praysons to avoid the provision that workers' compensation is the single source of recovery by allowing them to pursue an additional enhanced common law judgment when an employee of KCP&L who is injured or killed during the performance of the same work done by Mr. Bunger would be limited to workers' compensation benefits would be inequitable. Retroactive application of *Zueck* to this case resolves that inequity.

Another factor considered by the supreme court in *Zueck* was the reality that owners pay for the workers' compensation insurance of independent contractors since such amounts are included in the independent contractor's bid. *Id.* at 389. Retroactive application of *Zueck* would give KCP&L benefit of its premium payment for workers' compensation insurance (through its payment of B & L's contract price) out of which the Prayson's benefits as Mr. Bunger's survivors were paid.

Applying *Zueck* to this case eliminates other inequities, considered by the *Zueck* court, that would result from including Mr. Bunger within the inherently dangerous exception. It

eliminates the inequity that would result if KCP&L were found "vicariously liable" under the exception, were required to pay the judgment, and then were deprived of indemnity from B & L, necessarily adjudged negligent, by reason of B & L's immunity under the workers' compensation laws. *See Zueck*, 809 S.W.2d at 388-89. Even if KCP&L were granted indemnity, as it contends it is entitled to by reason of its contract with B & L,[2] the inequities would continue, for B & L would be deprived of the immunity other employers are afforded under the workers' compensation laws.

The purpose and effect of *Zueck* will only be enhanced and cannot be retarded by applying its holding in this case. The second factor of the *Sumners* fairness test does not call for prospective-only operation of *Zueck*.

The third factor of the three-part fundamental fairness test announced in *Sumners* requires the court to balance the interests of those who may be affected by the change in the law. *Sumners*, 701 S.W.2d at 724. Specifically, the court must consider the degree to which parties may have relied on the old rule and weigh the hardships that could result from applying the new rule against the possible hardships to those parties who would be denied the benefit of the new rule. *Id.*

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[2]This Court does not address that claim.

The Praysons argue that because they relied on the law as it existed prior to *Zueck* in deciding whether to file suit and in choosing what form their suit would take, fundamental fairness requires the rule in *Zueck* not be applied to them. The Praysons cite the supreme court's decision in *Trans UCU, Inc. v. Director of Revenue*, 808 S.W.2d 374 (Mo. banc 1991), as support for their contention. Reliance of which *Sumners* speaks is a party's reliance on *settled* law in governing his or her conduct *before* an incident which gives rise to litigation occurs, not in deciding whether to pursue litigation after the incident. *Trans UCU* is not inconsistent with this Court's interpretation.

In *Trans UCU*, Trans UCU, Inc. (UCU), a Delaware corporation with its principal office in Kansas City, Missouri, purchased and took delivery of an airplane in Wilmington, Delaware in 1986, believing, in reliance on the supreme court's ruling in *King v. L & L Marine Service, Inc.*, 647 S.W.2d 524 (Mo. banc 1983), that by purchasing the plane out-of-state and by immediately placing it in interstate commerce the transaction was outside the reach of the Missouri use tax laws. *Trans UCU*, 808 S.W.2d at 375. In 1987, the supreme court overruled *L & L Marine* in *Director of Revenue v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504 (Mo. banc 1987), making trans-

actions such as the one UCU engaged in taxable under Missouri's use tax. *Trans UCU*, 808 S.W.2d at 375. Based on the advice of its counsel, UCU believed that the *Superior Aircraft* ruling was prospective only and did not file a use tax return in Missouri in connection with its purchase and use of the aircraft. *Id.*

In 1988 the Director of Revenue attempted to apply *Superior Aircraft* retroactively and collect of $60,000 in use tax, plus interest and penalties, from UCU. *Id.* at 375-76. UCU protested, and the supreme court applied the *Sumners* tests and found that because UCU detrimentally relied on the law before *Superior Aircraft* and on the advice of its counsel after *Superior Aircraft*, it would be fundamentally unfair to apply *Superior Aircraft* retroactively to UCU. *Id.* at 377-78.

UCU relied on *L & L Marine* in deciding to purchase the airplane in Delaware and in deciding not to file a Missouri use tax return—conduct that occurred *before* litigation had begun. *Trans UCU* does not support the Prayson's argument that reliance on an old rule in bringing suit and in determining the form of litigation is the type of reliance in *Sumners* requiring prospective-only application of a new law.

Furthermore, UCU relied upon *settled* law; the Praysons did not. The supreme court had not addressed the impact of

workers' compensation laws upon the inherently dangerous activity exception before *Zueck*. *Zueck*, 809 S.W.2d at 388-90.

Examination of the hardships each party will incur upon the application of *Zueck* to this case is not persuasive to stray from the general rule of retroactivity. The application of *Zueck* still permits the Praysons' recovery for Mr. Bunger's death through workers' compensation. Both *Sumners* tests require that *Zueck* be applied retroactively.

As their final arguments under point I, the Praysons argue that (1) retroactive application of a change in tort law effected by a judicial decision constitutes a denial of equal protection, and (2) the trial court's granting of the j.n.o.v. constituted an unjust taking because the jury verdict in favor of the Praysons became a vested property right under the due process clauses. The Praysons fail to cite Missouri authority for either of these arguments. Point I is denied.

II.

The Praysons contend as their second point on appeal that the trial court erred in denying their motion requesting leave to file their Second Amended Petition.[3] The trial court

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[3]The Praysons contend in their second point relied on that the trial court erred in "DISMISSING APPELLANTS' FIRST COUNT IN THEIR PROPOSED SECOND AMENDED PETITION," but the trial court

denied the motion because the court found that Count I of the petition failed to state a cause of action.

KCP&L contends that even if the trial court erred in finding Count I of the Praysons' second amended petition failed to state a cause of action, the Praysons failed to preserve such error by filing a third amended petition which did not include the Count I allegations. KCP&L argues the Praysons "abandoned" their Count I allegations and waived any error committed by the trial court by filing a third amendment.

The general rule is that an amended petition operates as an abandonment of the original petition. *Scott v. Gibbons*, 611 S.W.2d 387, 389 (Mo. App. 1981). However, Missouri courts note an exception to the general rule. In *R.C. v. Southwestern Bell Telephone Co.*, 759 S.W.2d 617 (Mo. App. 1988), R.C. brought a lawsuit against several defendants. *Id.* at 619. The counts against some of the defendants were dismissed because the trial court held that the defendants were immune from suit. *Id.* As the appellate court noted, "[n]o amendment could correct that problem." *Id.* When R.C. amended her allegations against the remaining defendants, she did not include the previously-dismissed defendants and "thereby force those defen-

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actually denied a motion the Praysons filed seeking leave to file a second amended petition.

dants and the court to repeat the dismissal procedure they had previously engaged in." *Id.* The appellate court in *R.C.* found that R.C. did not abandon her cause of action against the dismissed defendants by amending her petition. *Id.* The court held:

> Where the reason for dismissal is not correctible [sic] by an amended pleading and the case remains pending against other defendants, the court and the parties should not be required to engage in useless procedural gestures in order to preserve the propriety of the dismissal for review.

Id. at 619-20.

An analogous situation is presented in this case. The trial court denied the Praysons' motion for leave to file their second amended petition because the trial court found that Count I failed to state a cause of action. From the transcript of the hearing, it is apparent that the trial judge believed that *Ballinger* precluded the Praysons from bringing a claim of direct liability against KCP&L. *Ballinger*, though, only eliminates the *Smith* requirement of showing negligence on the part of the owner to prevail in a claim based on pure vicarious liability. *Ballinger*, 788 S.W.2d at 511. Neither *Ballinger* nor *Zueck* preclude a claim of direct liability on the part of an owner for injury or death to a person engaged in inherently

dangerous activities on the owner's premises at the owner's behest. *See Zueck*, 809 S.W.2d at 391 (Blackmar, C.J., concurring).

The trial judge would not allow Count I to be filed. Rather than seek leave to file a third amended petition containing the Count I and then go through the exercise of having the trial court deny their motion again, the Praysons proceeded with their Third Amended Petition on Count II, alleging only the vicarious liability of KCP&L.

That the Praysons did not abandon Count I by filing the Third Amended Petition was even recognized by the trial judge, who stated "I have...allowed the filing of a third amended petition which is done with [the Praysons] waiving any of the issues that are presented by their request to file the second amended petition," and "I agree with [the Praysons] there was no abandonment in what they've done since it was coerced not voluntary."

In determining whether the Praysons stated a cause of action in Count I, every pleaded fact and every favorable inference which may reasonably be drawn from the facts pleaded is assumed true. *Kennedy v. Kennedy*, 819 S.W.2d 4406, 408 (Mo. App. 1991). If the facts pleaded and the reasonable infer-

ences show any ground that would entitle the Praysons to relief, the motion should not have been denied. *Id.*

While *Zueck* forecloses any claim against an owner under the inherently dangerous activity exception for *vicarious* liability, a claim against an owner for direct liability based on the owner's own negligence is still available. *See Zueck*, 809 S.W.2d at 391 (Blackmar, C.J., concurring). Mr. Bunger, as an employee of B & L, working on property owned by KCP&L was a business invitee. *Schneider v. Union Elec. Co.*, 805 S.W.2d 222, 226 (Mo. App. 1991). His status as business invitee entitled him to KCP&L's ordinary care to make its premises reasonably safe for use. *Id.* To make a case against an owner, an employee of an independent contractor, as a business invitee, must plead and prove (1) a dangerous condition existing on the owner's property which involves an unreasonable risk, (2) that the owner knew or by using ordinary care should have known of the condition, (3) that the owner failed to use ordinary care inn removing or warning of the danger, and (4) as a result the employee sustained injury. *Id.*

Count I of the Praysons' Second Amended Petition purports to allege the Praysons' cause of action against KCP&L for direct negligence. The Count alleges that Mr. [Bunger] was electrocuted when the non-insulated wrench he was holding

slipped off a de-energized fuze [sic] mounting and contact a fuze [sic] mounting that was energized. Mr. [Bunger] was installing lightning accessories and squirrel-proofing on a transformer when he was killed. Paragraph 7 of Count I alleges that installing lightning arrestors and squirrel-proofing transformers utility poles (the work B & L was hired to perform) was an inherently dangerous activity and involved a particular risk of injury to B & L employees performing the work. Paragraph 3 alleges KCP&L was and is in the business of generating, transmitting, distributing, and selling electricity. The specific allegations of negligence are listed in paragraph 9 (a) - (e). Paragraph 9 (a) - (e) state that KCP&L negligently:

> (a) failed to provide existing Kansas City Power & Light Company safety materials such as Safety Rules for Outside Physical Employees to employees of B & L Electric, Inc. such as Larry Dean Bunger;
>
> (b) failed to monitor B & L Electric, Inc. to insure that all work was performed in accordance with applicable safety standards and/or safety rules;
>
> (c) failed to promulgate standarized [sic] procedures for squirrel proofing transformers which incorporated safe methods of performing work and provide such procedures to B & L Electric, Inc.;
>
> (d) failed to supervise and/or monitor B & L Electric, Inc. to insure employees of B & L Electric, Inc. were utilizing insulated safety devices such as gloves or blan-

kets when working in an energized area on overhead power lines and equipment;

(e) failed to supervise and/or monitor B & L Electric, Inc. to insure that line work on or around energized lines and equipment was performed by qualified employee(s) of B & L Electric.

B & L was an independent contractor. As an independent contractor, KCP&L was not liable for damages caused by the tortious acts or omissions of B & L. *Nance v. Leritz*, 785 S.W.2d 790, 792-93 (Mo. App. 1990). KCP&L was no obligated to supervise the work performance of independent contractor B & L to determine that it was being performed in a manner that provided a safe work environment for B & L's employees. *Martin v. First Nat'l of Independence Co.*, 372 919, 923 (Mo. 1963); *McHugh v. National Lead Co.*, 60 F. Supp. 17, 23 (E.D. Mo. 1945), *appeal dismissed*, 154 F.2d 829 (8th Cir. 1946). Had KCP&L supervised or monitored B & L as the Praysons' allege it should have, KCP&L would have altered its independent contractor relationship with B & L and may have incurred liability. *Werdehausen v. Union Elec. Co.*, 801 S.W.2d 358, 364 (Mo. App. 1990). Those allegations in paragraph 9 of Count I that KCP&L should have supervised and/or monitored B & L fail to state a cause of action.

Assuming that a reasonable inference from the allegations is that KCP&L knew or should have known that the work it hired B & L to do required activity near dangerous electrically charged transformers and utility power lines and involved an inherently dangerous activity and a high risk of injury to employees of B & L, one cannot then reasonably assume from the specific allegations of negligence that B & L and Mr. Bunger were unaware of the danger of electrical current in transformers and utility power lines with which Mr. Bunger worked. B & L was hired as an independent contractor by KCP&L to place devices on or near electrical lines. Mr. Bunger's job included the placement of the devices on transformers located on utility power lines. Paragraph 8 of Count I of the proposed amended petition states that Mr. Bunger had de-energized the transformer on which he was working at the time of his death by opening the fuse on the fuse mounting. Mr. Bunger demonstrated knowledge necessary to perform his job safely. Mr. Bunger's knowledge of the danger was at least equal to that if KCP&L. For KCP&L to warn B & L and Mr. Bunger of the danger of electrical current in utility power lines and transformers on or near which work was to be performed would have been to warn them of an obvious danger which they already knew. B & L's knowledge of the danger and the

willingness of its employees to work within proximity of the danger was probably a reason for which the company was hired. The owner of a premises is under no duty to warn of dangers which an employee of an independent contractor was deemed to have foreseen as necessarily incidental to his employment. *McHugh v. National Lead Co.*, 60 F. Supp. at 22.

Count I of Appellant's Second Amended Petition did not state a cause of action. The trial court did not err in denying the Praysons' motion for leave to file their second amended petition.

The trial court's judgment n.o.v. is affirmed.

Robert G. Ulrich, Judge

All concur.

IN THE SUPREME COURT OF MISSOURI

No. 75649
W.D. No. 44932

January Session, 1993

Jamie Marie (Bunger) Prayson, et al., Appellants,

vs. (TRANSFER)

Kansas City Power & Light Company, Respondent.

Now at this day, on consideration of appellants' application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January session thereof, 1993, and on the 23rd day of March, 1993, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 23rd day of March, 1993.

Thomas F. Simon, Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

ORDER

Defendant has filed a motion for summary judgment. The motion asserts that as a matter of law, defendant, and others who employ independent contractors, should not be liable for the injuries of the employees of the independent contractor.

Missouri law provides that someone who engages an independent contractor may be held liable for injuries to the employees of that contractor if the work involved is inherently dangerous. *Hofstetter v. Union Electric Co.* 724 S.W.2d 527 (Mo. App., 1986), *Mallory v. Louisiana Pure Ice and Supply Co., et al.*, 6 S.W.2d 617 (Mo. Banc, 1928).

Whether the Missouri courts have considered the arguments defendant is making is immaterial. Missouri law presently allows this type of lawsuit. This court is not empowered to change that law. Defendant's motion for summary judgment is **DENIED**.

DATE: January 10, 1991

PRESTON DEAN, JUDGE

Copies mailed to:

William Pickett
Robert Gingrich

GLADYS TYREE, Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

SECOND AMENDED PETITION FOR DAMAGES—WRONGFUL DEATH

Count I

(8109)

COME NOW the plaintiffs, Jamie Marie Bunger and Jason Dean Bunger, by and through their Next Friend and Mother, Mary Jane Prayson, and for Count I of this Petition for Damages against the defendant, state and allege:

1. That plaintiffs are residents of Jackson County, Missouri.

2. Plaintiffs are the natural children of decedent Larry Dean Bunger, and, therefore, the proper parties to bring this suit for wrongful death under §537.080(1) Mo.Rev.Stat., and plaintiffs bring this cause of action on behalf of all other proper

party plaintiffs who are entitled to join by virtue of the laws of the State of Missouri in this action for the wrongful death of Larry Dean Bunger.

3. That defendant Kansas City Power & Light Company is a corporation incorporated under the laws of the State of Missouri and, was and is, in the business of generating, transmitting, distributing, and selling electricity to its patrons throughout portions of the State of Missouri, including Jackson County, for use as power and lighting purposes, therefore, transacting business within the State of Missouri and that defendant has made and is making contracts within the State of Missouri; that defendant has committed tortious acts in the State of Missouri; that all of the foregoing acts give rise to the cause of action alleged by plaintiffs in this Petition; and further, that under §506.150 Mo.Rev.Stat., defendant has submitted itself to the jurisdiction of this Court.

4. That defendant was the owner of the wires, transformers and other equipment on a pole located at 9415 Richmond, Kansas City, Jackson County, Missouri and that these premises were under the exclusive control of the defendant by virtue of the work being done there.

5. At all times herein mentioned and on or about January 18, 1985, the plaintiffs' decedent, Larry Dean Bunger,

was an employee of B & L Electric, Inc. and was acting within the scope and course of his employment with B & L Electric, Inc.

6. That prior to January 18, 1985, defendant contracted with B & L Electric, Inc. for line work including the installing of lightning arrestors and squirrel proofing of the transformers on utility power lines.

7. That at all times herein mentioned, the work of installing lightning arrestors and squirrel proofing of transformers on utility power lines was an inherently dangerous activity and involved a high and particular risk of injuries to the employees of B & L Electric, Inc., unless special precautions were taken to guard against such risk of injury; that such inherently dangerous activities involved in the aforesaid installation of lightning arrestors and squirrel proofing of transformers on utility power lines at 9415 Richmond, Kansas City, Missouri, was reasonably necessary to the performance of the contract between the aforesaid defendant-owner of Kansas City Power & Light Company and B & L Electric, Inc.

8. That on or about January 18, 19885, at the site of the utility power line located at 9415 Richmond, Kansas City, Missouri, plaintiffs' decedent, Larry Dean Bunger, in the course and scope of his employment with B & L Electric, Inc.,

was engaged in installing lightning arrestors and squirrel proofing the transformer on the utility power line. While thus engaged, plaintiffs' decedent, Larry Dean Bunger, de-energized the transformer by opening the fuse on the fuse mounting, and while utilizing a non-insulated wrench with his right hand to loosen a bolt brought said non-insulated tool in contact with the top of the fuse mounting which was still energized with electricity. Because plaintiffs' decedent, Larry Dean Bunger, was working in the general vicinity of lethal and dangerous 7,200 volt electricity at all times while attempting to replace the wire from the bottom of the cutout to the top of the transformed, he was in close proximity to said electricity. Due to the negligent acts and omissions of defendant Kansas City Power & Light Company as specifically set forth herein, plaintiffs' decedent, Larry Dean Bunger, was electrocuted when his non-insulated crescent wrench slipped off of the bottom of the fuse mounting which was de-energized and made contact with the top of the energized fuse mounting which was still energized, thereby, because of its close proximity to the location where he was working, causing his death when contact with the non-insulated crescent wrench was made with the energized portion of the top of the fuse mounting.

(a) Negligently failed to provide existing Kansas City Power & Light Company safety materials such as Safety Rules for Outside Physical Employees to employees of B & L Electric, Inc. such as Larry Dean Bunger;

(b) Negligently failed to monitor B & L Electric, Inc. to insure all work was performed in accordance with applicable safety standards and/or safety rules;

(c) Negligently failed to promulgate standardized procedures for squirrel proofing transformers which incorporated safer methods of performing work and provide such procedures to B & L Electric, Inc.;

(d) Negligently failed to supervise and/or monitor B & L Electric, Inc. to insure employees of B & L Electric, Inc. were utilizing insulted safety devices such as gloves or blankets when working in an energized are on overhead power lines and equipment;

(e) Negligently failed to supervise and/or monitor B & L Electric, Inc. to insure that line work on or around energized liens and equipment was

performed by qualified employee(s) of B & L Electric, Inc.

10. That at all times herein mentioned, the death of plaintiffs' decedent, Larry Dean Bunger, was attended by aggravated circumstances.

11. That as a direct and proximate result of the aforementioned negligence and wrongdoing of defendant Kansas City Power & Light Company, plaintiffs Jamie Marie Bunger and Jason Dean Bunger have each suffered the following injuries, to wit:

(a) they have lost and will in the future suffer the loss of pecuniary support of their father; and

(b) they have suffered and will in the future suffer the loss of services, companionship, comfort, instruction, guidance, counseling, training, and support of their father.

12. That as a further direct and proximate result of the negligence and wrongdoing of defendant, as aforesaid, plaintiffs' decedent, Larry Dean Bunger, suffered pain of mind and body, and incurred expenses for medical care, the exact amount of which is unknown at this time, and necessary funeral expenses, all to the damage of the plaintiffs, and each of them, pursuant to §537.090 Mo.Rev.Stat.

13. Plaintiffs further allege under §537.090 Mo.Rev.Stat. that the trier of fact is entitled to consider the aggravated circumstances in determining the amount of damages to be allotted to plaintiffs.

WHEREFORE, plaintiffs, Jamie Marie Bunger and Jason Dean Bunger demand judgment against defendant Kansas City Power & Light Company in a sum that is fair and reasonable, taking into account the aggravated circumstances pertaining to the injuries suffered by Larry Dean Bunger, which proximately caused his death on January 18, 1985, for their costs herein incurred and expended, and for such other and further relief as the Court deems just and proper.

Count II

(Vicarious Liability)

COME NOW the plaintiffs and for Count II of this Second Amended Petition for Damages, allege and state as follows:

1-13. Plaintiffs incorporate by reference, as though fully set forth herein, paragraphs 1 through 7 of this Second Amended Petition for Damages.

14. That on or about January 18, 1985, at the site of the utility power line located at 9415 Richmond, Kansas City, Missouri, plaintiffs decedent, Larry Dean Bunger, in the course

and scope of his employment with B & L Electric, Inc., was engaged in installing lightning arrestors and squirrel proofing the transformer on the utility power line. while thus engaged, plaintiffs' decedent, Larry Dean Bunger, de-energized the transformer by opening the fuse on the fuse mounting, and while utilizing a non-insulated wrench with his right hand to loosen a bolt brought said non-insulated tool in contact with the top of the fuse mounting which was still energized with electricity. Because plaintiffs' decedent, Larry Dean Bunger, was working in the general vicinity of lethal and dangerous 7,200 volt electricity at all times while attempting to replace the wire from the bottom of the cutout to the top of the transformer, he was in close proximity to said electricity. Due to the negligent acts and omission of B & L Electric, Inc. as specifically set forth herein, plaintiffs decedent, Larry Dean Bunger, was electrocuted when his non-insulated crescent wrench slipped off of the bottom of the fuse mounting which was de-energized and made contact with the top of the energized fuse mounting which was still energized, thereby, because of its close proximity to the location where he was working, causing his death when contact with the non-insulated crescent wrench was made with the energized portion of the top of the fuse mounting.

15. Defendant Kansas City Power & Light Company had a non-delegable duty to prevent injury to third persons, such as the decedent Larry Dean Bunger, for the inherently dangerous activities performed by B & L Electric, Inc. in accordance with the purchase order between defendant Kansas City Power & Light Company and B & L Electric, Inc. and that the negligence of B & L Electric, Inc. is thereby imputed to defendant Kansas City Power & Light Company.

16. That B & L Electric, Inc. was negligent and careless in the following respects, to wit:

(a) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure appropriate insulted safety devices such as rubber gloves or blankets were in use when working on or around overhead power lines and equipment;

(b) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure work was performed in accordance with applicable safety standards;

(c) Negligently failed to promulgate standardized procedures for squirrel proofing transformers

which incorporated safe methods of performing such work;

(d) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure two qualified employees were on a pole when working on or around energized power lines and equipment;

(e) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure the crew foreman observed and directed the crew members when working in an energized area on a pole;

(f) Negligently failed to insure that the squirrel proofing work on the power pole at 9415 Richmond, Kansas City, Missouri, was performed by a qualified employee of B & L Electric, Inc.

17. That at all times herein mentioned, the death of plaintiffs' decedent, Larry Dean Bunger, was attended by aggravated circumstances.

18. That as a direct and proximate result of the aforementioned negligence of B & L Electric, Inc. which is imputed to defendant Kansas City Power & Light Company,

plaintiffs Jamie Marie Bunger and Jason Dean Bunger have each suffered the following injuries, to wit:

(a) they have lost and will in the future suffer the loss of pecuniary support of their father; and

(b) they have suffered and will in the future suffer the loss of services, companionship, comfort, instruction, guidance, counseling, training, and support of their father.

19. That as a further direct and proximate result of the negligence and wrongdoing of defendant, as aforesaid, plaintiffs' decedent, Larry Dean Bunger, suffered pain of mind and body, and incurred expenses for medical care, the exact amount of which is unknown at this time, and necessary funeral expenses, all to the damage of the plaintiffs, and each of them, pursuant to §537.090 Mo.Rev.Stat.

20. Plaintiffs further allege under §537.090 Mo.Rev.Stat. that the trier of fact is entitled to consider the aggravated circumstances in determining the amount of damages to be allotted to plaintiffs.

WHEREFORE, plaintiffs Jamie Marie Bunger and Jason Dean Bunger demand judgment against defendant Kansas City Power & Light Company in a sum that is fair and reasonable, taking into account the aggravated circumstances

pertaining to the injuries suffered by Larry Dean Bunger, which proximately caused his death on January 18, 1985, for their costs herein incurred and expended, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

William H. Pickett #21324
Steve A. Matalone, II #36374
WILLIAM H. PICKETT, P.C.
417 East 13th Street, Suite 400
Kansas City, MO 64106
816/221-4343
Fax #: 816/221-8258

ATTORNEYS FOR PLAINTIFFS

I hereby certify that a copy of the above and foregoing was mailed this ___ day of January, 1991, to:

Robert P. Gingrich, Esq.
Kansas City Power & Light Company
1330 Baltimore
P. O. Box 418679
Kansas City, MO 64141
ATTORNEYS FOR DEFENDANT

Attorney for Plaintiffs

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

ORDER

Before the Court is Plaintiffs Jamie and Jason Bunger's motion for leave to file a second amended petition.

Because Count I of Plaintiffs' Second Amended Petition fails to state a cause of action, Plaintiffs' motion is thereby **DENIED**.

DATE: January 28, 1991

_____

PRESTON DEAN, JUDGE

Copies mailed to:

Steve Matalone
Robert Gingrich

GLADYS TYREE, Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED PETITION

COME NOW plaintiffs, Jamie Marie Bunger and Jason Dean Bunger, and hereby respectfully submit the following Suggestions in Support of Plaintiffs' Motion for Leave to File Third Amended Petition for Damages.

Pursuant to Rule 55.33(a), Mo.R.Civ.P., plaintiffs are requesting leave to amend their Petition for Damages to conform the Petition with the Supreme Court decision in *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990). (See Exhibit A, Third Amended Petition for Damages.) In addition, plaintiffs have deleted the allegations

of direct negligence contained in Count I of plaintiffs' proposed Second Amended Petition in accordance with the Court's Order denying leave to file plaintiffs' proposed Second Amended Petition. (See attached Exhibit "B").

The purpose of Rule 55.33(a) is to allow matters to be presented which were overlooked or unknown to the party or parties when the first pleading was filed. *DeArmon v. City of St. Louis*, 525 S.W.2d 795, 802 (Mo. Ct. App. 1975); *Bohrman v. Schremp*, 666 S.W.2d 30 (Mo. Ct. App. 1984).

Rule 55.33 states in pertinent part:

> (a) **Amendments.** A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; *and leave shall be freely given when justice so requires*. (Emphasis added).

In the instant action, plaintiffs completed the depositions of employees of defendant and B & L Electric, Inc. in January,

1991. During the depositions information was gleaned, of which plaintiffs were unaware, as to the nature and extent of the negligence of B & L Electric, inc. which necessitates amending the Petition to clarify same.

Plaintiffs seek to conform the allegation of negligence on the theory of the inherently dangerous activity doctrine as set forth and clarified in the case of *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc). The original Petition and Amended Petitions filed by plaintiffs alleges only the direct negligence of defendant and pursuant to the Supreme Court decision in *Ballinger* defendant can be held vicariously liable based upon the negligence of the independent contractor hired by defendant to perform the inherently dangerous activity. The deposition of plaintiffs' expert, Dr. Thomas Browne, was taken on January 11, 1991, and in light of the opinions given plaintiffs seek to amend the Petition clarifying the allegations and narrowing the issues at trial. This amendment should come as no surprise to defendant as defendant was advised at the deposition on January 11, 1991, that plaintiffs would seek to amend in conformity with the opinions expressed by plaintiffs' expert. When an amendment would come as no surprise to a defendant it should be liberally

granted. *Jordan v. Robert Half Personnel*, 615 S.W.2d 574 (Mo. Ct. App. 1981).

The claims raised in plaintiffs' proposed Second Amended Petition relate back to the filing of the original pleading. Rule 55.33, Mo.R.Civ.P., provides in pertinent part:

> (c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

The law in the State of Missouri is clear. In *Koerper & Company v. United International*, 739 S.W.2d 705 (Mo. 1987) (en banc), the Missouri Supreme Court, in a unanimous decision, decided that an amended pleading relates back to the time of filing of the original pleading when the amended pleading arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. In the instant case, until extensive discovery was completed and the *Ballinger* decision was announced, plaintiffs were unable to seek an amendment clarifying the allegations. Here plaintiffs merely seek to conform the Petition against defendant to the law of Missouri. For the above and foregoing reasons,

plaintiffs' Motion for Leave to File Third Amended Petition should be granted.

Respectfully submitted,

William H. Pickett #21324
Steve a. Matalone, II #36374
WILLIAM H. PICKETT, P.C.
417 East 13th Street, Suite 400
Kansas City, MO 64106
816/221-4343
Fax #: 816/221-8258

ATTORNEYS FOR PLAINTIFFS

I hereby certify that a copy of the above and foregoing was hand delivered this 31st day of January, 1991, to:

Robert P. Gingrich, Esq.
Kansas City Power & Light Company
1330 Baltimore
P. O. Box 418679
Kansas City, MO 64141
ATTORNEYS FOR DEFENDANT

Attorney for Plaintiffs